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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JOSE A., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE A.,

Defendant and Appellant.

D070276

(Super. Ct. No. J236748)

APPEAL from a judgment of the Superior Court of San Diego County,

Roderick W. Shelton and Melinda J. Lasater, Judges. Affirmed.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The juvenile court sustained allegations Jose A. (Minor) committed a misdemeanor for vandalism of property (Pen. Code,¹ § 594, subd. (a)(b)(2)(A); count 3).² The court adjudged Minor a ward of the court and granted probation under certain terms and conditions. (Welf. & Inst. Code, § 602.) On appeal, Minor contends the probation conditions regarding warrantless electronic devices and Internet searches are unreasonable and unconstitutionally overbroad. We conclude both conditions are reasonable and constitutional. We, therefore, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Minor was stopped on two separate occasions by police officers for being associated with a tagging³ crew placing graffiti on public property. The first time Minor was stopped, he was seen walking with another individual who was tagging graffiti on lampposts and street signs. Minor was holding up a metallic rectangular device, later identified as an iPad or notebook. It appeared Minor was acting as a lookout and trying to block from view the individual who was tagging. Minor was also seen looking at the device and holding it near the graffiti.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The court found there was insufficient evidence to prove beyond a reasonable doubt that Minor committed misdemeanor vandalism (§ 594, subd. (a)(b)(2)(A); count 1) and possession of a tobacco product (§ 308, subd. (b); count 2).

³ Tagging means "to deface with a graffito [usually] in the form of the defacer's nickname." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 1272, col. 1.)

Two police officers arrived on the scene and detained Minor and the other individual. The officers found "UGSK" tagged on a sign and "NWOK" tagged on two different light poles.⁴ The officers searched Minor and the other individual. The officers found two markers on the other individual and arrested him, but found nothing illegal on Minor and released him. Photographs taken of Minor and the other individual during the detention showed Minor holding a metallic item, such as a tablet, in his lap.

A week later, police officers were flagged down by a motorist who told them she observed a group of males tagging. The officers saw four males including Minor, standing on a corner. The officers detained and searched Minor and the other three males. They found spray paint cans and markers with the other males. The officers found a cell phone in Minor's possession, which had "NWOK" marked on the back of the cell phone, the same markings police found on the freshly tagged items in the area.

During the adjudication hearing, the juvenile court found true allegations Minor aided and abetted in vandalism. At the disposition hearing, Minor was granted probation with certain conditions.

The conditions prohibited Minor from knowingly associating with any person he knows or reasonably knows is a member of the "NWOK" tagging crew, or from possessing any utensils used for graffiti or for vandalizing any property.

An additional condition extended the Fourth Amendment waiver to "any electronic device, such as a computer, electronic notepad, or cell phone, which the

⁴ The letter K is used to represent a "Krew" or group of individuals. "UGSK" stands for "Until Graffiti Stops Krew" and "NWOK" stands for "No Way Out Krew."

[M]inor uses or to which the [M]inor has access" as well as "any remote storage of any files or data which the [M]inor knowingly uses or to which the [M]inor has access." The condition stated Minor agreed to "submit to a search of any electronic device, such as a computer, electronic notepad, or cell phone, at any time without a warrant by any law enforcement officer, including a probation officer." Another condition required Minor to provide "all passwords or pass phrases to any [I]nternet sites or social media sites, such as Facebook, Twitter, SnapChat, or Google+, used or accessed by the [M]inor. When asked by any law enforcement officer, including a probation officer, the [M]inor shall submit those websites to a search at any time without a warrant. The [M]inor shall not knowingly clean or delete his ... Internet browsing activity." Minor objected to the electronic devices and Internet search conditions, arguing they were an "overstretch" and "overreach[]" by the government.

The juvenile court adopted the electronic and Internet search conditions. The court commented both gangs and tagging crews are "intricately involved with things that go on in social media." The court explained Minor's behavior and involvement with a tagging crew made it necessary to monitor Minor's cell phone and social media accounts to ensure "he's not involved with the tagging crew." The court also noted Minor's parents did not believe Minor was involved in criminal activity and recommended the parents search Minor's cell phone to truly "understand what [Minor is] really involved in and what he's really doing." After Minor was released to his mother, he twice failed to meet with probation officers for an interview, he was suspended from school for using marijuana, and the school was considering expulsion.

DISCUSSION

I

General Principles and Standard of Review

Courts have wide discretion when determining the conditions and scope of probation. (§ 1203 et seq.) Courts have even more latitude when it comes to minors. (*Ginsberg v. New York* (1968) 390 U.S. 629, 638.) The court can impose and require any and all reasonable conditions it determines are proper for the minor's reformation and rehabilitation because minors require more guidance than adults. (Welf. & Inst. Code, § 730). Therefore, a normal invasion of a protected freedom for an adult may be permissible for a minor. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.)

When determining probation conditions for minors under its jurisdiction, the court is essentially standing in the shoes of the parents and is responsible for the minor's well-being. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 909–910.) Accordingly, courts can consider the minor's entire social history to determine appropriate probation conditions. (*In re R.V.* (2009) 171 Cal.App.4th 239, 246.) Probation for adults is an act of leniency, whereas probation for minors, is an "ingredient" to the minor's reformation and rehabilitation. (*In re Ronnie P.* (1992) 10 Cal.App.4th 1079, 1089.) Although courts have greater discretion when determining probation conditions for minors, the conditions must still be sufficiently tailored to both the minor's needs and the condition's purpose. (*In re P.O.* (2016) 246 Cal.App.4th 288, 293.)

Currently, our Supreme Court is considering the issue of whether it is error to impose an electronic search condition on a juvenile as a condition of probation when the

condition has no relationship to the crime or crimes committed, but is justified as reasonably related to future criminality under *People v. Olguin* (2008) 45 Cal.4th 375 (*Olguin*) because it would facilitate supervision of the juvenile. (*In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923.) The appellate courts considering the issue do not have a uniform approach on how to deal with these juvenile probation conditions. Many cases uphold the condition as reasonable, under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), but strike it down as unconstitutionally overbroad, often remanding the case to juvenile court to narrow or modify the scope of the condition.⁵

Minor contends the probation conditions requiring warrantless searches of all accessible electronics and Internet sites are invalid under *Lent, supra*, 15 Cal.3d 481 and unconstitutionally overbroad. We review the *Lent* challenge for abuse of discretion (*Olguin, supra*, 45 Cal.4th at p. 382), and the constitutional challenge de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143).

⁵ Cases in which review has been granted on this issue and briefing is deferred pending decision in *In re Ricardo P., supra*, S230923 include: *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted March 9, 2016, S232240; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted April 13, 2016, S232849; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted February 17, 2016, S231428; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted December 14, 2016, S238210. According to California Rules of Court, rule 8.1115(e), which took effect on July 1, 2016, a published opinion may be cited only for potentially persuasive value while review is pending.

II

Reasonableness Under Lent

The California Supreme Court explained a condition on probation will be struck as invalid only if the condition satisfies each of the following three elements: (1) there is no relationship between the condition and the offender's crime, (2) the condition relates to conduct not otherwise criminal, and (3) the condition does not reasonably relate to the prevention of future criminality. (*Lent, supra*, 15 Cal.3d at p. 486.) This standard equally applies to minors' probation conditions. (*In re D.G.* (2010) 187 Cal.App.4th 47, 52 (*In re D.G.*)). Here, the electronic device condition is reasonable under the first prong and the Internet search condition is reasonable under the third prong.

A

Electronic Search Condition

Under *Lent*, if the condition is forbidding conduct which is not itself criminal, the condition may be valid if it is reasonably related to the crime committed. (*Lent, supra*, 15 Cal.3d at p. 486.) The reasonableness of the connection is measured by both the circumstances of the current offense and the minor's entire social history. (*In re J.B.* (2015) 242 Cal.App.4th 749, 754 (*J.B.*)). We conclude the electronic device search condition is reasonably related to the current crime and is thus valid under *Lent*.

Here, Minor had electronic devices in his possession in each incident. It was reasonable for the juvenile court to connect his current criminal activity with electronic devices. First, unlike in *J.B., supra*, 242 Cal.App.4th at page 749, where there was no evidence in the record connecting the defendant's petty theft to electronic devices, Minor

here used what appeared to be an electronic device to aid and abet the tagging crew. Minor used the tablet device as he walked with an individual who was tagging. He looked at the device and held it in front of the graffiti, while also attempting to block the individual who was doing the tagging from the view of the oncoming traffic. It is not unreasonable to infer Minor may have been taking and storing pictures of the graffiti. Second, when Minor was stopped by police officers a week later, he had another electronic device, a cell phone, with marks on the back matching the graffiti tags found in both police encounters.

Juvenile courts have broad discretion in imposing probation conditions and such discretion will not be disturbed absent a showing of manifest abuse. (*J.B., supra*, 242 Cal.App.4th at p. 754.) Since electronic devices were used in both instances, the record reflects there was a reasonable nexus between the electronic device condition and the circumstances of Minor's current crime and social history. Thus, the condition permitting a search of electronic devices is valid under *Lent* and the court did not abuse its discretion.

B

Internet Search Condition

We turn next to the condition requiring Minor to provide all passwords or pass phrases to Internet and social media sites used by Minor. There is no evidence any Internet sites were used during Minor's current crime and password protected Internet sites are not in themselves criminal. Thus, it must be reasonably related to preventing Minor's future criminality to be valid under *Lent, supra*, 15 Cal.3d 481. The California

Supreme Court held probation conditions allowing probation officers to effect supervision or enforce other probation requirements are conditions that prevent future criminality. (*Olguin, supra*, 45 Cal.4th at p. 381 [upholding a probation condition requiring a defendant to notify probation officers of any pets in the residence].)

Depending on the circumstances of the case, there may be a need for a higher degree of supervision for a minor. Appellate courts, which have rejected electronic and Internet search conditions as unreasonable, acknowledge there are "cases where, based on the defendant's history and circumstances, an electronic search condition bears a reasonable connection to the risk of future criminality." (*In re Erica R.* (2015) 240 Cal.App.4th 907, 914 (*Erica R.*)). Minor relies upon both *Erica R.* and *J.B., supra*, 242 Cal.App.4th 749 to argue that the Internet password condition does not reasonably prevent future criminal activity. Both cases are distinguishable.

In *Erica R.*, the appellate court rejected the validity of electronic and Internet search conditions because there was nothing in the record to connect the condition with the minor's possession and consumption of ecstasy. (*Erica R., supra*, 240 Cal.App.4th at p. 912.) The court explained there was nothing in the record showing the minor had a predisposition of using electronic devices for her criminal activity. (*Id.* at p. 913.) Moreover, the juvenile court solely relied on its judicial discretion without any supporting evidence the condition would reasonably prevent against future criminality. (*Ibid.*)

In *J.B.*, the minor was arrested and convicted of petty theft and the juvenile court adopted a probation condition, requiring disclosure of passwords for electronic devices

and social media sites. (*J.B.*, *supra*, 242 Cal.App.4th p. 752.) The appellate court rejected the condition because the juvenile court reasoned the minor *would* use the Internet to arrange meetings to steal items. (*Id.* at p. 754.) However, there was nothing in the record to support the juvenile court's reasoning. Without evidence connecting the relationship between the Internet sites and future criminal activity, the court's reasoning was pure speculation. (*Ibid.*)

This case is distinguishable from both *Erika R.* and *J.B.* because there is evidence Minor was involved with a "tagging crew." Tagging crews are similar to gangs in a variety of ways and are treated the same when dealing with minors because both have the potential to create genuine concerns for the minor. (See, e.g., *People v. Garcia* (2008) 168 Cal.App.4th 261, 276–277 [tagging crew may be elevated to a criminal street gang]; *People v. Superior Court (Johnson)* (2004) 120 Cal.App.4th 950, 956 ["a group of more than three people, having a common name or symbol, having as its primary activities the commission of the crime of felony vandalism, and whose members have committed and conspired to commit the crime on many separate occasions, is a criminal street gang"].) "Where a court entertains genuine concerns that minor is in danger of falling under the influence of a street gang ... [e]vidence of current gang membership is not prerequisite to imposition of conditions designed to steer minors from this destructive path." (*In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1502.)

Here, the juvenile court acknowledged the similarities between gangs and tagging crews and concern for Minor's involvement with such groups in the future. Both times Minor was detained, he was with individuals who were involved in vandalism. The first

time, Minor was seen actively participating with the tagging crew by walking with the individual committing the vandalism and holding an electronic device near each location as the other individual placed the tag. The second time Minor was stopped and searched, he was with three other individuals engaging in tagging activity, and he had in his possession a cell phone bearing the same graffiti tag found at the scene. When he was released to his mother's custody, Minor continued to risk his education and future.

The court explained there was a sufficient basis to impose this condition because it "is a way for probation to supervise [Minor] and make sure he's not involved with the tagging crew" or still participating in vandalism. One of Minor's unchallenged probation conditions is to not associate with anyone he knows or reasonably knows who is a member of the "NWOK" tagging crew or any other criminal street gang. The probation department needs access to Minor's social media accounts as well as other image storing or sharing sites to ensure Minor is not violating his probation conditions. Given the court's broad discretion alongside Minor's social and criminal history, the Internet search condition is reasonably related to Minor's other probation conditions and prevention of future criminality.

II

Constitutionality of the Conditions

Minor alternatively argues if the electronic and Internet search conditions are reasonable under *Lent, supra*, 15 Cal.3d 481, they are nevertheless unconstitutionally overbroad. The People contend Minor did not properly preserve the constitutional objections at trial and forfeited his right to challenge the constitutionality of the

condition. However, the California Supreme Court recognized conditional challenges do not need to be preserved at trial if they present pure questions of law or are easily remedied on appeal. (*Sheena K, supra*, 40 Cal.4th at pp. 889–890.) Therefore, we will consider Minor's contention on its merits.⁶

Since probation cannot be waived by minors, probation conditions limiting a minor's constitutionally protected rights must be closely tailored to the condition's purpose and the minor's circumstances. (*In re Sheena K., supra*, 40 Cal.4th at p. 890.) Regarding challenges based upon constitutional privacy rights, probation conditions are valid if " 'the invasion of the privacy interest is justified because it substantially furthers one or more legitimate competing or countervailing privacy or non-privacy interest.' " (*People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1176 (*Ebertowski*).) Generally, the state's interest in probation conditions for minors is twofold: protect the public from future criminality and provide minors with the best chance for rehabilitation. (*In re Jose C.* (2009) 45 Cal.4th 534, 555.)

"The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the [probationer]'s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.*, (2010) 188 Cal.App.4th 1149, 1153.) Thus, even conditions that would violate an

⁶ Because we address the merits of Minors constitutional challenge, we do not reach the issue of ineffective assistance of counsel.

adult's constitutional rights, may be valid if they are tailored to meet the minor's specific needs. (*In re D.G.*, *supra*, 187 Cal.App.4th at p. 52.)

Here, the search conditions for electronic devices and Internet sites are constitutional because they are tailored to the purpose of the probation condition and the Minor's circumstances. Without access to passwords for Internet and social media accounts used by Minor, the probation officer would not be able to search them to fully assess compliance with unchallenged association and tools of vandalism conditions. (*Ebertowski*, *supra*, 228 Cal.App.4th at p. 1175.)

Additionally, the court expressed concern with Minor's home supervision. Specifically, the court acknowledged the mother's failure to appreciate the seriousness of Minor's misconduct and advised the mother to look at Minor's electronic devices. Minor's mother rolled her eyes during the proceedings. Minor's mother did not believe her son committed any crimes and when confronted with Minor's suspension and possible expulsion from school she insisted the school officials were lying. The court commented it was necessary to increase the degree of supervision outside of the home because the mother "turns a blind eye" from Minor's criminal behavior.

The goal of probation for a minor is to ensure the minor is rehabilitated and will not continue criminal activity. (*Shaun R*, *supra*, 188 Cal.App.4th at pp. 1142-1143.) Here, the search conditions for electronic devices and Internet sites will allow probation officers to ensure Minor is not tagging, associating with members of his tagging crew, and is obeying the law. Minor's behavior and limited home supervision required a higher degree of supervision.

Moreover, Minor fails to identify any specific privacy interests this court should consider. Minor cites to *Riley v. California* (2014) ___ U.S. ___, [134 S.Ct. 2473, 2493 (*Riley*)], to support his contention that his privacy rights are violated and the conditions should be stricken all together. *Riley* is inapposite. The United States Supreme Court recognized the vast amount of personal data on electronic devices. (*Ibid.*) However, *Riley* only held the information on a cell phone is subject to the Fourth Amendment's protection, "not that the information on a cell phone is immune from search." (*Ibid.*)

Further, the Supreme Court in *Riley* was analyzing the privacy interests of arrestees who are afforded the presumption of innocence until proven guilty. (*Riley, supra*, 134 S.Ct. at pp. 2488–2489.) Here, the juvenile court found true an allegation Minor was aiding and abetting a tagging crew. As a probationer, Minor does not enjoy the same absolute liberty afforded to every citizen. (See *United States v. Knights* (2001) 534 U.S. 112, 119.) Access to Minor's electronic devices and Internet sites are sufficiently tailored to the objective of keeping Minor from his continuous criminal behavior. (See *In re Charles G.* (2004) 115 Cal.App.4th 608, 615.) Therefore, both the electronic and Internet search conditions are constitutionally valid.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

O'ROURKE, J.